# STATE OF MICHIGAN

# COURT OF APPEALS

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LYN ULRICH,

Plaintiff/Counter-Defendant-Appellee,

v

JOHN SHILLING,

Defendant/Counter-Plaintiff-Appellant.

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UNPUBLISHED
July 8, 2003

No. 237979
Branch Circuit Court
LC No. 01-000148-NZ

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Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, the court found defendant liable for publishing defamatory statements regarding plaintiff. The court awarded plaintiff $500 in damages and $2,780.45 in costs and attorney fees, and ordered defendant to print a retraction statement regarding the defamatory remarks. The court also dismissed defendant's counterclaim, finding no cause of action. Defendant appeals as of right. We reverse and remand.

In 1997, defendant was recalled as township supervisor, a process that began by the circulation of a petition for recall (the 1997 petition) which contained unflattering comments regarding defendant. In 2000, both parties sought to be elected township supervisor. This case arose from advertisements printed in a newspaper by both parties during that political campaign.

After plaintiff won the 2000 primary election, defendant placed an advertisement in a free local publication delivered to every home in Branch County, which aimed to discourage citizens from voting for plaintiff in the general election. The advertisement included the statement, "I [defendant] already know he [plaintiff] is a liar. All the things he said about me to get me out of office were not true, just to get me out so he could get in, POWER." In regards to this statement, defendant argues that the trial court erred in two respects: (1) in concluding that his characterization of plaintiff as a "liar" was neither an opinion nor a "rhetoric hyperbole," and (2) in placing the burden of proof on defendant, instead of on plaintiff.

When reviewing a defamation claim, an appellate court must independently examine the record to ensure against forbidden intrusions into free expression. *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). A statement is defamatory if "considering all the circumstances, it tends so to harm the reputation of another as to lower him

in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* In order to establish a claim of defamation, a plaintiff must prove:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. [*Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 666-667; 635 NW2d 36 (2001).]

Defendant first contends that plaintiff cannot establish the first element—that of a false and defamatory statement—because the "liar" statement was mere opinion or hyperbole, rather than a statement of fact. We disagree.

> [T]he United States Supreme Court has rejected the idea that all statements of opinion are protected and has directed that the defamatory statement must be provable as false to be actionable. In *Milkovich* [*v Lorain Journal Co*, 497 US 1, 17-20; 110 S Ct 2695; 111 L Ed 2d 1 (1990)], the Court by way of example distinguished the actionable statement, "In my opinion Mayor Jones is a liar," from the nonactionable statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin." The Court apparently intended to distinguish between an objectively verifiable event in the former case and a subjective assertion in the latter. Similarly, in *Ireland* [*v Edwards*, 230 Mich App 607, 617; 584 NW2d 632 (1998)], we concluded that the statement that plaintiff Ireland was not a fit mother was necessarily subjective and was therefore not actionable. We note, however, that a statement may be necessarily subjective and also be objectively verifiable. A statement that plaintiff is a murderer, which the trial court found to be implied from defendant's statements, falls into that category.
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> The Supreme Court has also determined that defamatory statements, in order to be actionable, must state actual facts about a plaintiff, thereby protecting statements that, although factual on their face and provable as false, could not reasonably be interpreted as stating actual facts about the plaintiff.
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> The Supreme Court has further recognized that statements must be viewed in context to determine whether they are capable of defamatory interpretation, or whether they constitute no more than "rhetorical hyperbole" or "vigorous epithet." [*Kevorkian, supra* at 5-7; internal citations omitted.]

Read in context, defendant's "liar" statement asserts that plaintiff told untruths about defendant in the 1997 petition. We find that this statement is capable of defamatory meaning because plaintiff could prove that he did not speak untruths about defendant. In fact, plaintiff testified at length as to the justification for each of the statements in the 1997 petition. In addition, we believe a reasonable person would understand defendant's "liar" statement as describing actual facts, rather than being mere rhetoric, as defendant suggests. Thus, the trial court did not err in concluding that the statement was actionable.

We nevertheless reverse the trial court's decision. In its oral judgment on the record, the trial court stated that "there were no assertions, no testimony, no evidence to suggest any *support* for [defendant's] allegation that [plaintiff] is a liar." Therefore, it appears that the court placed the burden of proof on defendant. However, the law states that if the plaintiff is a public official, the plaintiff must prove by clear and convincing evidence that "the publication was a defamatory falsehood and that it was made with actual malice through knowledge of its falsity or through reckless disregard for the truth." *Tomkiewicz, supra* at 677, quoting *Kefgen v Davidson*, 241 Mich App 611, 624; 617 NW2d 351 (2000). This rule was first enunciated in *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), and has become known as the *Sullivan* standard.[1] The same rule applies to public figures. *Gertz v Robert Welch, Inc*, 418 US 323, 342-345; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

It is clear that plaintiff was a public figure when defendant published the alleged defamatory statements.[2] Plaintiff was a candidate in the election campaign for Algansee Township Supervisor. Candidates for public office are public figures for First Amendment/defamation purposes. *Monitor Patriot Co v Roy*, 401 US 265, 271-272; 91 S Ct 621; 28 L Ed 2d 35 (1971). In addition, plaintiff stipulated at trial that he was, indeed, a public figure. Therefore, the burden of proof in this case was on plaintiff, *Kefgen, supra* at 624. Accordingly, we remand this case for reconsideration of this issue under the proper rule, the *Sullivan* standard, placing the burden on the proper party, plaintiff. Specifically, the trial court must determine whether the statement was made with actual malice, as the record does not show that the court engaged in such an analysis.

Defendant next argues that the trial court erred in determining that another statement he made was not protected speech. Defendant's advertisement ended with the statement, "If you have any business dealings with him [plaintiff], be careful, he has also been known to write a bad check." Defendant asserts that this statement was constitutionally protected because honesty in business directly relates to a candidate's competency for public office. We agree.

As mentioned above, defamatory remarks relating to a public official's official conduct are protected by a qualified privilege under *Sullivan, supra*. *Tomkiewicz, supra* at 667-668. The United States Supreme Court has held "as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the … rule of … *Sullivan*." *Monitor Patriot Co, supra* at 277. The Court reasoned that "syllogistic manipulation of distinctions between 'private sectors' and 'public sectors,' or matters of fact and matters of law, is of little utility in resolving questions of First Amendment protection." *Id*. at 273. The Court further

[1] Specifically, the United States Supreme Court held that a public official can only recover for damages for a defamatory falsehood relating to his official conduct if he proves that the statement was made with actual malice, i.e., knowledge that the statement was false or a reckless disregard of whether it was false or not. *Sullivan, supra* at 279-280.

[2] Whether a person is a public figure, and, therefore, defamatory remarks made regarding that person are subject to a qualified privilege (must be made with actual malice to be actionable) is a question of law. *Tomkiewicz, supra* at 669.

commented, "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Id*. at 273-274, quoting *Garrison v Louisiana*, 379 US 64, 76-77; 85 S Ct 209; 13 L Ed 2d 125 (1965). Moreover, in a companion case, the Court noted, "Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the [*Sullivan*] rule." *Ocala Star-Banner Co v Damron*, 401 US 295, 300-301; 91 S Ct 628; 28 L Ed 2d 57 (1971).

The trial court clearly found that defendant's "bad check" statement referred to a specific criminal act. Thus, it was relevant to plaintiff's fitness for political office. We do not believe that the preceding phrase, "If you have any business dealings with him . . ." removed the statement from the sphere of remarks related to official conduct. When read in context, it is apparent that defendant's "bad check" statement was inserted to further discourage voters from electing plaintiff. It is a fundamental principle of defamation law that the court must read all statements as a whole "and not examine separate sentences or portions or with an eye constrained to the objectionable feature alone." 50 Am Jur 2d § 124; see also *Morganroth v Whitall*, 161 Mich App 785, 790; 411 NW2d 859 (1987).

Instead of instructing the trial court on remand to consider the "bad check" statement in context, however, we simply reverse the court's decision because we disagree with the court's additional finding that the statement was made with actual malice.[3] Whether the evidence supports a finding of actual malice is a question of law. *Tomkiewicz, supra* at 677.

In its oral decision, the trial court concluded that "viewed in the context of [defendant's] belated recognition of his dislike for the plaintiff," the statement was made with actual malice, and stated, "This is libel." However, "[r]eckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice." *Id*. (quotations and citations omitted).

Additionally, the record does not indicate that plaintiff proved by clear and convincing evidence that defendant had actual knowledge that the "bad check" statement was false. Plaintiff had a business dealing with a long-time friend of defendant's. The "bad check" was actually a check on which plaintiff stopped payment. Defendant testified that he heard his friend tell a third party that he received a bad check from plaintiff. The friend testified that he believed a stop-payment check was a bad check. While there were certainly indications that defendant should have investigated the statement to substantiate its veracity, the record shows that defendant did not know the statement was false. Accordingly, we hold that the statement was not made with actual malice, and, therefore, defendant cannot be held liable for the "bad check" statement.

[3] The burden of proof and the definition of actual malice are the same in both *Sullivan, supra*, and MCL 600.2911(6). Therefore, even though the trial court did not analyze this issue under the *Sullivan* standard, a remand is unnecessary.

Finally, defendant argues that the trial court erred in concluding that his counterclaim was barred by the statute of limitations. The period of limitations for libel or slander is one year. MCL 600.5805(9). Defendant's counterclaim was based on plaintiff's August 2000 advertisement. Defendant filed his complaint in March 2001, within the limitations period. However, the court concluded that because the defamatory statements were merely a reprint of the 1997 petition, defendant's cause of action related back to 1997 and thus, his complaint was not timely filed. The court also stated that plaintiff was protected by the defense of truth because the August 2000 advertisement accurately reprinted the contents of the 1997 petition and plaintiff could not be held liable for the subsequent publication because he was not the original author of the 1997 petition.

After reviewing the issue, we simply cannot agree with the trial court's conclusions. In a defamation case, the statute of limitations begins to run at the time the defamatory remark was published. *Wilson v Knight-Ridder Newspapers, Inc*, 190 Mich App 277, 279; 475 NW2d 388 (1991). Each publication of the defamatory statement constitutes a separate cause of action. *Grist v Upjohn Co*, 1 Mich App 72, 81; 134 NW2d 358 (1965). Although the August 2000 advertisement contained the language of the 1997 petition, when read as a whole, it is clear that the advertisement was a separate publication at a different time with a different audience and intended message, encouraging voters not to elect defendant again versus recalling him from office. Therefore, it constituted a separate cause of action. See 2 Restatement Torts 2d § 577A.

Additionally, there is no tenable basis for the court's conclusion that because the 1997 petition was reprinted verbatim in the August 2000 advertisement the defense of truth was implicated. Even a republication of the exact same story containing defamatory remarks in the morning and evening editions of a newspaper constitute separate causes of actions. 2 Restatement Torts 2d § 577A. Finally, the fact that plaintiff was not the author of the 1997 petition is irrelevant because a person can be liable for libel even if it is merely a repetition of what another person said. *Orth v Featherly*, 87 Mich 315, 319; 49 NW 640 (1891); *Rouch v Enquirer & News of Battle Creek*, 137 Mich App 39, 42 n 1; 357 NW2d 794 (1984). Accordingly, the trial court erred in dismissing defendant's counter-complaint. On remand, the court should consider the merits of defendant's counter-complaint.

Reversed and remanded for proceedings consistent with our above instructions. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood